12700 NORWALK BLVD., P.O. BOX 1030, NORWALK, CA 90651-1030 * PHONE: 562/929-5700 * FACSIMILE: 562/929-5773 * WWW.NORWALKCA.GOV

December 6, 2012 **VIA EMAIL**

State Water Resources Control Board
Office of Chief Counsel
Jeannette L. Bashaw, Legal Analyst
P.O. Box 100
Sacramento, California 95812-0100
Facsimile: (916) 341-5199
jbashaw@waterboards.ca.gov

Dear Ms. Bashaw:

The City of Norwalk ("City" or "Petitioner") hereby submits this Petition for Review ("Petition") to the California State Water Resources Control Board ("State Board") pursuant to section 13320(a) of the California Water Code ("Water Code"), requesting that the State Board review an action by the California Regional Water Quality Control Board, Los Angeles Region ("Regional Board"). Specifically, Petitioner seeks review of the Regional Board's November 8, 2012 Municipal Separate Stormwater Sewer System ("MS4") Permit, Order No. R4-2012-0175, reissuing NPDES Permit No. CAS004001 ("Permit").

Petitioner requests that this Petition be held in abeyance at this time pursuant to 23 C.C.R. § 2050.5(d). As an initial matter, Petitioner has every intention in abiding by the Permit in good faith and is genuinely optimistic about working with the Regional Board to assess and implement the strategies and requirements necessary for compliance. Nevertheless, the Permit contains significant issues that concern Petitioner, and other aspects that the Petitioner believes are flawed. Thus, while Petitioner has every hope that it will not need to request that the State Board act on any of the issues raised herein, as a matter of prudence and protection against the uncertainty of such a momentous and unprecedented Permit and other potential legal challenges that may ultimately alter the Permit, the Petitioner wishes to file this Petition and have it held in abeyance until such time as Petitioner requests the State Board to act on the Petition, if ever.

1. Names, Addresses, Telephone Numbers and E-mail Addresses of Petitioner

City of Norwalk
c/o Michael J. Egan, City Manager
12700 Norwalk Blvd.
Norwalk, CA 90650
(562) 929-5772
(562) 929-5780

With copies to Petitioner's Counsel to:

Lisa Bond
Candice K. Lee
Andrew J. Brady
Richards, Watson & Gershon
355 South Grand Ave., 40th Floor
Los Angeles, CA 90071
Phone: (213) 626-8484
Fax: (213) 626-0078
lbond@rwglaw.com
clee@rwglaw.com
abrady@rwglaw.com

2. The Specified Action of the Regional Board Upon Which Review is Sought

By this Petition, the City is challenging the Regional Board's November 8, 2012 adoption of the "Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within the Coastal Watersheds of Los Angeles County, Except those Discharges Originating from the City of Long Beach MS4," Permit, Order No. R4-2002-0175, reissuing NPDES Permit No. CAS004001.

3. The Date of the Regional Board's Action

The Regional Board approved the challenged Permit on November 8, 2012.

4. Statement of Reasons the Action of the Regional Board was Inappropriate and Improper

Petitioner believes the Permit generally embodies a workable approach to improving water quality in the County, while reflecting the work the permittees have initiated during the prior permit terms and the work they have committed to perform in the future. However, several provisions of the Permit – including the imposition of numeric standards in the Receiving Water Limitations provisions, the manner of the incorporation of various Total Maximum Daily Loads ("TMDL") and numeric Water Quality Based Effluent Limitations ("WQBEL") provisions, the Permit's monitoring requirements, the Permit's economic considerations, provisions on joint liability, and

certain minimum control measures – are inappropriate or improper in that, among other things, they impose obligations on Petitioner that are not mandated or supported by the Clean Water Act ("CWA"), the Porter-Cologne Water Quality Control Act ("Porter-Cologne"), or other applicable law. A more detailed discussion of these issues is provided in the Statement of Points and Authorities below.

5. The Manner in Which the Petitioner Has Been Aggrieved

Petitioner is a permittee under the Permit. It, along with the other permittees, is responsible for compliance with the Permit. Failure to comply with the Permit exposes Petitioner to administrative liability under the CWA and Porter-Cologne and potential lawsuits by the Regional Board and/or third parties under the CWA's citizen suit provision. To the extent that certain provisions in the Permit are improper or inappropriate, Petitioner should not be subject to such actions.[1]

6. The Specific Action Requested of the State Board With This Petition

The issues raised in this Petition may be resolved or rendered moot by actions to be taken by the permittees, Regional Board staff actions, amendment of the Permit, and/or developments in other jurisdictions. Accordingly, Petitioner requests the State Board hold this Petition in abeyance at this time pursuant to 23 C.C.R. § 2050.5(d). Depending on the outcome of these actions, Petitioner will, if necessary, request the State Board to act on all or some of the issues raised in the Petition and schedule a hearing. Petitioner will provide a complete list of specific actions requested if and when the Petitioner requests the State Board to act on this Petition.

7. Statement of Points and Authorities in Support of Legal Issues Raised in the Petition

The following is a brief discussion of the issues Petitioner raises in this Petition. In addition to the issues discussed below, to the extent not addressed or inadequately addressed by the Regional Board in its responses to comments, Petitioner also seeks review of the Permit on the grounds raised in Petitioner's previous written comments, copies of which are attached hereto as Exhibit "A." Petitioner will submit to the State Board a complete statement of points and authorities in support of this Petition, as necessary, if and when Petitioner requests the State Board to take the Petition out of abeyance and act upon it.

a. The Permit Should Be Revised To Be Consistent with the Maximum Extent Practicable Standard and State Policy by Allowing Compliance Through an Iterative Management Process and Not Require Strict Adherence to Numeric Standards in Receiving Waters and for WQBELs

[1] Petitioner may provide the State Board with additional information concerning the manner in which it has been aggrieved by the Regional Board's action in adopting the Permit. Any such additional information will be submitted to the State Board as an amendment to this Petition.

Consistent with both State and Federal standards, and in particular the Federal Maximum Extent Practicable ("MEP") standard applicable to municipal storm water permits, permittees should be able to achieve compliance with the entire Permit through good faith adherence to a best management practice ("BMP")-based iterative approach. The Permit, on the other hand, and contrary to controlling policy, appears to require adherence to strict numeric standards in receiving water bodies and for WQBELs.

The Federal MEP standard for MS4 Permits is a BMP-based, iterative process that does not require adherence to strict numeric standards. *See* Permit, Attachment A, p. A-11; 2003 EPA Memo, "Guidance on Definition of Maximum Extent Practicable"; *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999); *Divers Environmental Conservation Organization v. State Water Resources Control Board*, 145 Cal.App.4th 246, 256 (2006); *BIA v. State Water Quality Resources Control Board*, 124 Cal.App.4th 866, 889-90 (2004); 1993 State Board Memorandum, "Definition of Maximum Extent Practicable." Accordingly, the Permit's imposition of numeric standards exceeds the Federal MEP, which has numerous legal ramifications discussed further below.

Under a regime of enforceable numeric standards, even if the permittees are doing all they can by implementing required BMPs in good faith, they can still be held in violation of the Permit, for reasons that are entirely beyond their control. Such an outcome is unfair, and contrary to law. *BIA*, *supra*, 124 Cal.App.4th at 889 (MEP standard requires showing of technical and economic feasibility); *Hugley v. JMS Dev. Corp.*, 78 F.3d 1523, 1529-30 (11th Cir. 1996) (The CWA does not require permitees to achieve the impossible). The MS4 is too large, too complicated, and there is no model to assess and track the movement of pollutants into, through, and out of it. Accordingly, numeric standards are simply inappropriate at this time.

i. The Receiving Water Limitations Language's Numeric Standards

The Receiving Water Limitation ("RWL") provisions of the Permit indicate that strict adherence to the numeric water quality standards is required in receiving waters for permittees, regardless of whether a permittee adheres to a BMP-based iterative approach in good faith or not. *See, e.g.*, Permit, part V.A.1; Fact Sheet pp. F-36-37.

In prior permits, the RWL standard, despite having similar (but not identical) language, was understood to be an iterative process where compliance would not be measured according to numeric water quality exceedances, but through a BMP-based iterative process. *See* State Board Order No. 99-05; State Board Order No. 2001-15.

The RWL language in the Permit is inconsistent with State Board Water Quality Order No. 99-05 and other prior precedents and Orders. State Board Water Quality Order No. 99-05 unequivocally requires compliance with storm water management plans as a means of complying with receiving water limitations and, therewith, water quality standards. In State Water Quality Order No. 2001-15, the State Board affirmed

the iterative approach in stating that "we will generally not require 'strict adherence' with water quality standards through numeric effluent limitations and we continue to follow an iterative approach." State Board Order No. 2001-15, p. 8. Finally, most recently, the State Board, on September 7, 2012, found that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges." *See* Fact Sheet for NPDES Permit and Waste Discharges Requirements for State of California Department of Transportation, NPDES Permit No. CAS000003, Order No. 2012-XX-DWG.

Although these latter items regard numeric effluent limitations, the same logic is even more applicable to receiving water limitations, over which individual permittees maintain even less control. Imposing numeric standards for the receiving water body is thus infeasible, unachievable, and will require the development of BMPs that violate and exceed the requirements of law. *See* Permit, Attachment A, p. A-11 (the Permit's own definition of MEP states that BMP's must be effective, have public support, exhibit reasonable relationship between cost and benefit achieved, and be technically feasible).

ii. The Provisions in the Permit Requiring Adherence to Numeric WQBELs Exceed Federal Requirements and Violate State and Federal Law and Policy

1. The Permit's WQBELs Were Improperly Formulated

The Regional Board failed to provide adequate justification for incorporating numeric water quality based effluent limitations ("WQBELs") in the Permit for each of the 33 incorporated Total Maximum Daily Loads ("TMDL") to which they apply. A WQBEL is an enforceable translation in an MS4 permit for attaining compliance with a TMDL Waste Load Allocation ("WLA"), which serves to protect beneficial uses of a receiving water. 40 C.F.R. § 130.2. The Permit fails to establish that an adequate requisite Reasonable Potential Analysis ("RPA") has been conducted.

The Permit fails to establish if discharges from any individual permittee's MS4 have the reasonable potential to cause or contribute to an excursion above any "State water quality standard including State narrative criteria for water quality." *See* EPA's November 12, 2010 Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs" ("EPA Memorandum"), which states:

> Where the NPDES authority determines that MS4 discharges *have the reasonable potential to cause or contribute to a water quality excursion*, EPA recommends that, where feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards.

EPA Memorandum, p. 2 (emphasis added).

There are two generally accepted approaches to conducting an RPA. According to USEPA guidance, "A permit writer can conduct a reasonable potential analysis using effluent and receiving water data and modeling techniques, as described above, or using a non-quantitative approach." NPDES Permit Writers' Manual, September 2010, page 6-23.

Neither the administrative record nor the Permit's fact sheet contains any evidence of the Regional Board having performed an RPA in accordance with the two foregoing approaches. Regarding the first approach, such an analysis would in any case have been impossible to perform given that no outfall ("effluent") monitoring has been required for any Los Angeles County MS4 permit since the MS4 program began in 1990. No modeling appears to have been conducted either. Furthermore, the absence of any reference to WQBELs or RPA in any of the Regional Board's TMDLs counters its assertion that the TMDL development process satisfied the RPA requirement for establishing a numeric WQBEL in this instance.

Beyond this, federal regulations not only require that an RPA be performed to determine if an excursion above a water quality standard, but also that the storm water discharge must be measured against an "allowable" ambient concentration. 40 C.F.R. §122.44(d)(iii).

While wet and dry weather monitoring data have been generated relative to some TMDLs, such data cannot singularly serve to determine an excursion above a TMDL, even where such data does exist, which is not in every case. Outfall monitoring data would have to have been evaluated against in-stream generated ambient (dry weather) data to make such a determination. As for the second, non-quantitative approach, the Regional Board also failed to provide information in the Permit, its accompanying documents, or the administrative record indicating that it had performed a non-quantitative analysis based on recommended criteria described in USEPA guidance.

In lieu of conducting either a quantitative or non-quantitative RPA, the Regional Board concluded that reasonable potential can be demonstrated in several ways, one of which is through the TMDL development process. Fact Sheet, p. F-34. No citation to any authority was provided for this proposition. In essence, the Regional Board appears to claim that the same analysis it used to establish a TMDL constitutes a type of RPA. The logic it used to arrive at this conclusion is, however, faulty. A WQBEL is a means of attaining a TMDL WLA, a translation of a WLA into prescribed actions or limits which has in the past been typically expressed as a BMP. Before a WQBEL can be developed, however, a need for it must be established. As the Writers' Manual points out:

> The permit writer should always provide justification for the decision to require WQBELs in the permit fact sheet or statement of basis and must do so where required by federal and state regulations. *A thorough rationale is particularly important when the decision to include WQBELs is not based on an analysis of effluent data for the pollutant of concern.*

NPDES Permit Writers' Manual, September 2010, page 6-23 (emphasis added).

No such rationale is provided in the Regional Board's Fact Sheet, which in the absence of effluent data derived from outfall monitoring, would have been absolutely necessary to justify the need for a numeric WQBEL. It is possible that outfall monitoring could demonstrate that existing BMPs implemented through a MS4 permittee's storm water management plan is already meeting a TMDL WLA, thereby obviating the need for any WQBELs. But that was not done, and simply translating a TMDL WLA directly into a numeric WQBEL without the requisite analysis is a clear violation of permit-writing standards, applicable law and good practice.

Furthermore, and finally, the EPA Memorandum is clear that reliance on numerics should be coupled with the "disaggregation" of different storm water sources within permits. *See* EPA Memorandum at pp. 3-4. The Permit fails to adequately disaggregate storm water sources within applicable TMDLs regarding numeric WQBELs and for receiving water limitations, further making the imposition of numeric standards inappropriate.

2. The Permit's Numeric WQBELs Violate the Requirements of Law Because They are Infeasible

The Regional Board's numeric WQBELs are not feasible. The 2010 EPA Memorandum recommends "*where feasible*, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards." EPA Memorandum, p. 2 (emphasis added). This position is based on 40 CFR §122.44(k), which authorizes the use of BMPs "when numeric limitations are infeasible." In 1991, the State Board concluded that "numeric effluent limitations are infeasible as a means of reducing pollutants in municipal storm water discharges, at least at this time." State Water Resources Control Board Water Quality Order 91-03, page 49.

Although this determination was made over twenty years ago, the State Board's position on this issue has not changed since then, as evidenced by its adoption of the Caltrans MS4 permit in September of 2012. Citing the fact sheet for the Caltrans MS4 permit, the State Board affirmed that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges." Fact Sheet for NPDES Permit and Waste Discharges Requirements for State of California Department of Transportation, NPDES Permit No. CAS000003, Order No. 2012-XX-DWG, September 7, 2012, page 9.

The Caltrans MS4 permit's fact sheet also supports the use of BMP-based WQBELs as a means of meeting TMDLs and other quality standards. The Caltrans MS4 permit is also subject to TMDLs adopted by the Regional Board and USEPA. If this aspect of the Permit is not corrected, Los Angeles County MS4 permittees will be compelled to comply strictly with numeric WQBELs and receiving water limitations while Caltrans need only implement WQBEL BMPs to achieve compliance with the same TMDLs. This inconsistency lacks any justification.

Moreover, the Permit allows the use of BMPs to meet federal TMDLs. Having two different compliance standards, one for State adopted TMDLs that require meeting numeric WQBELs and one for USEPA adopted TMDLs that require BMP-based WQBELs is improper and inappropriate. Furthermore, while the State may impose requirements more stringent than federal regulations, it must provide a justification and conduct required analysis that has not been done in the Permit, its accompanying documents, or elsewhere in the administrative record. Water Code § 13241; *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 627 (2005).

b. Various TMDLs and TMDL Requirements Incorporated into the Permit Are Contrary to State and Federal Law and Policy

Various TMDLs incorporated into the Permit establish compliance with WLAs in the receiving water contrary to Federal storm water regulations and State Law. In addition to complying with TMDL WLAs at the outfall, the Permit also improperly requires compliance with TMDL WLAs (dry and wet weather) in the receiving water as a "limitation."

Examples include, but are not limited to, the metals TMDLs for the Los Angeles River adopted by the State, the metals TMDL for the San Gabriel River adopted by USEPA, the Los Angeles River Bacteria TMDL and the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants. The affected TMDLs all require in-stream monitoring to determine compliance with waste load allocations.

As will be addressed further below, Federal regulations only require two types of monitoring – effluent and ambient – for compliance: "The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards." 40 C.F.R. §122.44(d)(viii)(B).

USEPA defines effluent as outfall discharges. Ambient monitoring is defined by USEPA to mean the "natural concentration of water quality constituents prior to mixing of either point or nonpoint source load of contaminants. Reference ambient concentration is used to indicate the concentration of a chemical that will not cause adverse impact to human health." *See* EPA Glossary of Terms (http://water.epa.gov/scitech/datait/tools/warsss/glossary.cfm).

All TMDLs and other water quality standards are supposed to be ambient standards, as noted in a USEPA commissioned report: "EPA is obligated to implement the Total Maximum Daily Load (TMDL) program, the objective of which is attainment of ambient water quality standards through the control of both point and nonpoint sources of pollution."[2]

[2] National Research Council, Assessing the TMDL Approach to Water Quality Management Committee to Assess the Scientific Basis of the Total Maximum Daily Load Approach to Water Pollution Reduction, Water Science and Technology Board, page 12.

Although some of the TMDLs specify ambient monitoring such as the Los Angeles River Metals and Bacteria TMDLs, the Regional Board has misunderstood ambient monitoring to be a form of in-stream compliance monitoring, along with TMDL effectiveness monitoring. For example, the Los Angeles River Metals TMDL requires Los Angeles County MS4 permittees and Caltrans to submit a Coordinated Monitoring Plan ("CMP"), which includes both "TMDL effectiveness monitoring and ambient monitoring."[3]

The CMP that was submitted to and approved by the Regional Board proposed a monitoring plan that essentially treats TMDL effectiveness monitoring and ambient monitoring as being one of the same, and which collectively serve the purpose of determining compliance with dry and wet weather WLAs based on in-stream monitoring.

It is unclear why the Regional Board established two compliance standards, one of which (*viz.*, wet weather WLAs) is clearly not authorized under federal law. One explanation is that it did so because previously adopted TMDLs, some of which date back a few years, assumed that compliance would be determined by in-stream monitoring. The Regional Board was either not aware or ignored, at the time of the TMDLs adoption, that attainment of waste load allocations should be determined by outfall monitoring. More recently adopted TMDLs, such as the Machado Lake Nutrients TMDL, do not require compliance in the receiving water (the lake in this case), but instead compliance at the outfall. The Regional Board has not explained why certain TMDLs are required to comply at the outfall while others are required to comply in the receiving water.

The purpose of ambient monitoring is to evaluate the health of receiving waters determined during normal states – not when it rains. State-sponsored Surface Water Ambient Monitoring Programs (SWAMPs) recognize that ambient monitoring is only performed during dry weather. As mentioned above, ambient monitoring sets a reference point against which storm water discharges are measured to determine attainment of water quality standards. While the State and federal-adopted TMDLs call for both dry and wet weather WLAs, federal regulations do not recognize either. It is the ambient standard that is supposed to operate as a TMDL WLA.

c. The Regional Board Failed to Adequately Consider Economic Impacts Pursuant to Water Code Section 13241

The Regional Board's failure to adequately consider the economic impacts of the Permit, as required by Water Code Sections 13000 and 13241, render the Permit invalid. Water Code Section 13623 requires the Regional Board to include "[e]conomic considerations" under Water Code Section 13241 with its consideration of the Permit. The Regional Board incorrectly asserts that consideration of economics is not required in this Permit. *See* Permit, p. 26. Because, as demonstrated above and throughout,

[3]Total Maximum Daily Loads for Metals and Los Angeles River and Tributaries, U.S. Environmental Protection Agency, Region 9, California Regional Water Quality Control Board, Los Angeles Region, May 27, 2005, page 79.

the Permit requirements exceed the Federal MEP standard for storm water permits in numerous key regards, consideration of economic factors is necessary. *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 627 (2005).

The alleged facts in the economic consideration section of the Fact Sheet misrepresent the permittees' data and fail to consider the economic impact of new, costly aspects of the Permit. The Permit's economic analysis uses the 2001 permit as its basis. Accordingly, the Permit fails to take into account 33 new TMDLs, new Minimum Control Measures ("MCMs"), Watershed Management Programs, and the loss of the County of Los Angeles as principal permittee, among other factors.

It is also premature and improper to assume that permittees will obtain funding from proposed ballot measures and other sources of funding which have not even been approved, much less voted on by the public. *See* Permit, Fact Sheet, p. F-153. If the Regional Board wants to rely on initiatives, such as the Los Angeles County Flood Control District's Water Quality Funding Initiative, as sources of funding to offset the costs of storm water management, it should have delayed its public hearing and approval of the Permit until after the voters have actually voted on such initiatives. Otherwise, if such initiatives fail to pass, the co-permittees will be left to implement the Permit's requirements without these much-needed funds. Even if the Water Quality Funding Initiative is approved by the voters, the funds generated by the Initiative would not even be available until 2014 – well after the deadline for certain compliance deadlines set forth in the Permit. Moreover, the Water Quality Initiative will not cover all the costs imposed on all permittees by the Permit.

d. The Permit's Monitoring Program Exceeds the Requirements of Law

The Permit's Receiving Water Monitoring Program is improper for exceeding the scope of monitoring requirements authorized under Water Code Sections 13267 and 13383. Water Code Section 13267 states:

> "(b) (1) In conducting an investigation . . . the regional board may require that . . . any . . . political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports."

The Regional Board's failure to conduct and communicate the requisite cost-benefit analysis pursuant to the monitoring requirements in the Permit constitutes an abuse of discretion. Water Code §§ 13267 and 13225(c).

The relevant portions of Water Code Section 13383 state:

"(a) The . . . regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements . . . for any person who discharges, or proposes to discharge, to navigable waters. . . .

(b) The . . . or the regional boards may require any person subject to this section to establish and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods, sample effluent as prescribed, and provide other information as may be reasonably required."

The Permit goes far beyond a requirement that a permittee "monitor" the effluent from its own storm drains. The Permit's Receiving Water Monitoring Program seems to require a complete hydrogeologic model found in the receiving water body, which will in many cases be miles away from many of the individual permittees' jurisdictions. To the extent the Permit requires individual permittees to compile information beyond their jurisdictional control, they are unauthorized. Although Water Code Section 13383(b) permits the Regional Board to request "other information", such requests can only be "reasonably" imposed. Cal. Water Code § 13383(b). The Permit requires co-permittees to analyze discharges and make assumptions regarding factors well beyond their individual boundaries. This is not reasonable, and is therefore not permitted under Water Code Sections 13225, 13267, and 13383. It is equally unreasonable to require the monitoring of authorized or unknown discharges. *See* Permit at p. 108. The monitoring program also exceeds federal requirements which, in line with state requirements, do not require monitoring beyond the MS4. *See* 40 C.F.R. §122.26.

e. Provisions in the Permit Imposing Joint or Joint and Several Liability for Violations are Contrary to Law

The Permit appears to improperly impose joint liability and joint and several liability for water quality based effluent limitations and receiving water exceedances. The Permit states that "Permittees with co-mingled MS4 discharges are jointly responsible for meeting the water quality-based effluent limitations and receiving water limitations assigned to MS4 discharges in this Order." Permit, p. 23. The Permit then states that permittees are responsible for implementing programs within their jurisdictions "to meet the water quality-based effluent limitations and/or receiving water limitations assigned to such commingled MS4 discharges." *Id.*

It is both unlawful and inequitable to make a permittee liable for the actions of other permittees over which it has no control. A party to an MS4 Permit is responsible only for its own discharges or those over which it has control. *Jones v. E.R. Shell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1348 (N.D. Ga. 2004). Because the City cannot prevent another permittee from failing to comply with the Permit, the Regional Board cannot, as a matter of law, hold the City jointly or jointly and severally liable with another permittee for violations of water quality standards in receiving water bodies or for TMDL violations. Under the Water Code, the Regional Board issues waste discharge requirements to "the person making or proposing the discharge." Cal. Water Code § 13263(f). Enforcement is directed towards "any person who violates any cease and desist order or cleanup and abatement order . . . or . . . waste discharge requirement."

Cal. Water Code § 13350(a). In similar fashion, the CWA directs its prohibitions solely against the "person" who violates the requirements of the Act. 33 U.S.C. § 1319. Thus, there is no provision for joint liability under either the California Water Code or the CWA.

Furthermore, joint liability is proper only where joint tortfeasors act *in concert* to accomplish some common purpose or plan in committing the act causing the injury, which will generally never be the case regarding prohibited discharges. *Kesmodel v. Rand*, 119 Cal. App. 4th 1128, 1144 (2004); *Key v. Caldwell*, 39 Cal. App. 2d 698, 701 (1940). For any such discharge, it would be unlawful to impose joint liability and especially joint and several liability. Furthermore, the issue of imposing liability for contributions to "commingled discharges" of certain constituents, such as bacteria, is especially problematic because there is no method of determining who has contributed what to an exceedance.

Permittees should not be required to prove they did not do something when the Regional Board has failed to raise even a rebuttable presumption that the contamination results from a particular permittee's actions. Yet, by stating that the Permit "allows a Permittee to clarify and distinguish their individual contributions and demonstrate that its MS4 discharge did not cause or contribute to exceedances of applicable water quality-based effluent limitations and/or receiving water limitations," that is precisely what the Permit does. Permit, p. 24. Such a reversed burden of proof is contrary to law, and illicitly creates a presumption of "guilty until proven innocent." *See* Cal. Evid. Code § 500; *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658, 1667-1668 (2003).

The Regional Board has the burden of proof to establish a CWA violation, and requiring permittees to prove a negative in the case of a commingled discharge is unfair and unlawful. *Rapanos v. United States*, 547 U.S. 715, 745 (2006); *Sacket v. E.P.A.*, 622 F.3d 1139, 1145-47 (9th Cir. 2010) ("We further interpret the CWA to require that penalties for noncompliance with a compliance order be assessed only after the EPA proves, in district court, and according to traditional rules of evidence and burdens of proof, that the defendants violated the CWA in the manner alleged in the compliance order.")

f. The Permit Improperly Intrudes on Permittees' Local Land Use Authority

To the extent that this Permit relies on federal authority under the CWA to impose land use regulations and dictate specific methods of compliance, it violates the Tenth Amendment of the U.S. Constitution. Furthermore, to the extent the Permit requires a municipal permittee to modify its city ordinances in a specific manner, it also violates the Tenth Amendment. According to the Tenth Amendment,"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article XI, section 7 of the California Constitution also guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." *See also City of W.*

Hollywood v. Beverly Towers, 52 Cal. 3d 1184, 1195 (1991). Furthermore, the United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers to protect the public health, safety, and welfare of its residents. *See Berman v. Parker,* 348 U.S. 26, 32-33 (1954). Because it is a constitutionally conferred power, land use powers cannot be overridden by State or federal statutes.

Even so, both the CWA and the Porter-Cologne Act provisions regarding NPDES permitting do not indicate that the Legislature intended to preempt local land use authority. *Sherwin Williams Co. v. City of Los Angeles,* 4 Cal. 4th 893 (1993); *California Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal. App. 4th 1302, 1309 (1998) (Preemption of police power does not exist unless "Legislature has **removed** the constitutional police power of the City to regulate" in the area); *see* Water Code §§ 13374 and 13377 and 33 U.S.C. § 1342 (b)(1)(B).

The Permit essentially establishes the Regional Board as a "super municipality" responsible for setting zoning policy and requirements throughout Los Angeles County. In response to this objection, the Regional Board stated that "the permit does not impose land use regulations, nor does it restrict or control local land-use decision-making authority. Rather, the Permit requires the permittees to fulfill CWA requirements and protect water quality in their land use decisions." Responses to Comments H-53. This is simply not the case, as the permit improperly imposes numerous mandatory land use requirements, including but not limited to the adoption of low impact development ("LID") ordinances. *See, e.g.,* Ex. A at pp. 96-115 (Planning and Land Development Program).

g. The Permit Exceeds the Regional Board's Authority by Requiring the City to Enter Into Contracts and Coordinate With Other Co-permittees

The Regional Board cannot require the City to enter into agreements or coordinate with other co-permittees. The requirements that permittees engage in interagency agreements (Permit at p. 39) and coordinate with other co-permittees as part of their storm water management program (Permit at p. 56-58) are unlawful and exceed the authority of the Regional Board. The Regional Board lacks the statutory authority to mandate the creation of interagency agreements and coordination between permittees in an NPDES Permit. *See* Water Code §§ 13374 and 13377. The Permit creates the potential for City liability in circumstances where the permittee cannot ensure compliance due to the actions of third party state and local government agencies over which the City has no control. Such requirements are not reasonable regulations, and thus violate state law. *Communities for a Better Environment v. State Water Resources Control Bd.*, 132 Cal. App. 4th 1313, 1330 (2005) (regulation pursuant to NPDES program must be reasonable.)

h. Various Aspects of the Permit's Non-Stormwater Discharge Provisions Are Inconsistent with Federal Law and Contrary to State Law

The Permit contains a significant revision to non-stormwater discharge prohibitions: "Each Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges *through* the MS4 to receiving waters ..." Permit, p. 27. The previous 2001 permit, however, required MS4 permittees to "effectively prohibit non-storm water discharges *into* the MS4." The previous Permit also provided for several exceptions of non-stormwater discharges that could be legally discharged to the MS4. Non-stormwater discharges that were not exempted were deemed illicit discharges. The adopted Permit, on the other hand, revises the non-stormwater discharge prohibition by replacing "to" the MS4 with "through" the MS4 and in the case of TMDL discharges "from the MS4" to a receiving water.

The Regional Board's revised non-stormwater provision is not authorized under Federal storm water regulations. Nevertheless, the Regional Board attempts to rely on 40 C.F.R. §122.26(a)(3)(iv) to assert that an MS4 permittee is only responsible for discharges of storm water and non-storm water from the MS4. The Regional Board's citation mentions nothing about permittees being responsible for storm water and non-stormwater from the MS4. Instead, it states that co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewer system. But the term "discharges" as used in the regulation refers to storm water discharges only.

To the contrary, Section 402(p)(B)(ii) of the CWA, clearly specifies that MS4 permits "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." Nothing in this section or anywhere else in the CWA authorizes a prohibition of non-stormwater discharges "through" or "from" the MS4. In fact, the Regional Board cites no legal authority either in the Permit or the Fact Sheet to support changing the discharge prohibition from "to" or "into" the MS4 to "through" or "from" the MS4. By doing do, the Regional Board has illicitly expanded the non-stormwater discharge requirements beyond their permissible or reasonable scope, and beyond the MEP standard.

Additionally, the Permit improperly defines non-stormwater to expansively include all dry-weather runoff. This is contrary to State and Federal definitions of storm water, which include "surface runoff," "drainage," and "urban runoff." 40 C.F.R. § 122.26(b)(13); *see also* State Water Board Order No. 2001-15, pp. 7-8. This further expansion of the non-stormwater provisions exceeds the Federal requirements and places an additional, unfair burden on permittees forced to try to prohibit these discharges.

i. The Timing and Procedures of the Permit Adoption Were Contrary to Law and Deny the Permittees' Due Process Rights

The period provided to review and comment on the Permit was unreasonably short given the breadth of the Permit. Furthermore, the "dual" procedure the Regional Board adopted whereby part of the Permit could be discussed on October 4 and 5, 2012, without the benefit of seeing a revised draft tentative Permit or responses to comments, and then only allowing comments on "changes" to the Permit at the November 8, 2012 hearing, unreasonably limited the ability of the permittees to comment on the Permit as a whole based on the changes to the permittees' original comments. *See* Regional Board 9/26/12 "Order on Proceedings." By denying the permittees a meaningful opportunity to review and comment on a Permit that so drastically affects the permittees' rights and finances, the Regional Board has denied the permittees due process rights under state and federal law. *See Spring Valley Water Works v. San Francisco*, 82 Cal. 286 (1890) (reasonable notice and opportunity to be heard are essential elements of "due process of law," whatever the nature of the power exercised.) Furthermore, under the CWA, a reasonable and meaningful opportunity for stakeholder participation is mandatory. *See, e.g., Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 381 (8th Cir. 1994) ("the overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal CWA.")

j. The Regional Board's Forced Recusal of Board Member Mary Ann Lutz was Improper and Prejudiced the Municipal Permittees

Ms. Lutz was, at the time of the hearings, the Board member appointed to reflect the perspective of municipal governments. She was improperly forced by the Regional Board to recuse herself from the proceedings. By improperly forcing her recusal, the Regional Board staff and counsel purposefully and unduly prejudiced the municipal permittees by denying the Board, the permittees, and the public Ms. Lutz' valuable perspective as a municipal representative, public servant and Mayor.

k. The Permit as a Whole Constitutes an Unfunded State Mandate, Which Is Not Permitted by the California Constitution Unless Funding is Provided by the State

The Permit contains mandates imposed at the Regional Board's discretion that are unfunded and go beyond the specific requirements of either the CWA or the USEPA's regulations implementing the CWA, and thus exceed the MEP standard. Accordingly, these aspects of the Permit constitute non-federal state mandates. *See City of Sacramento v. State of California*, 50 Cal. 3d 51, 75-76 (1990). Indeed, the Court of Appeal has previously held that NPDES permit requirements imposed by the Regional Board under the Clean Water and Porter-Cologne Acts can constitute state mandates subject to claims for subvention. *County of Los Angeles v. Commission on State Mandates*, 150 Cal.App.4th 898, 914-16 (2007).

i. The Permit's Minimum Control Measure Program is an Unfunded State Mandate

The Permit's Minimum Control Measure program ("MCM Program") qualifies as a new program or a program requiring a higher level of service for which State funds must be provided. The particular elements of the MCM Program that constitute unfunded mandates are:

- The requirements to control, inspect, and regulate non-municipal permittees and potential permittees;
- The public information and participation program;
- The industrial/commercial facilities program;
- The public agency activities program; and
- The illicit connection and illicit discharge elimination program.

See Permit, p. 69-143.

The MCM Program requirement that the permittees inspect and regulate other, non-municipal NPDES permittees is especially problematic and clearly constitutes an unfunded mandate. *See, e.g.*, Permit at pp. 38-40. These are unfunded requirements which entail significant costs for staffing, training, attorney fees, and other resources. Notably, the requirement to perform inspections of sites already subject to the General Construction Permit is clearly excessive. Permittees would be required to perform pre-construction inspections, monthly inspections during active construction, and post-construction inspections. The Regional Board is requiring a higher level of service in this Permit than in prior permits.

Furthermore, there are no adequate alternative sources of funding for inspections. User fees will not fully fund the program required by the Permit. Cal. Gov't Code, § 17556(d). NPDES permittees already pay the Regional Water Quality Control Boards fees that cover such inspections in part. It is inequitable to both cities and individual permittees for the Regional Board to charge these fees and then require cities to conduct and pay for inspections without providing funding.

ii. The Permit's Imposition of Numeric Standards Render it an Unfunded Mandate

If strict compliance with numeric state water quality standards is required in the form of WQBELs and Receiving Water Limitations, the entire Permit will constitute an unfunded mandate because such a requirement clearly exceeds both the Federal standard and the requirements of prior permits, despite the fact no funding will be provided to help meet targets. *See Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, 124 Cal. App. 4th 866, 873, 884-85 (2004) (though the State and Regional Boards may require compliance with California state water quality standards pursuant to the CWA and state law, these requirements exceed the Federal Maximum Extent Practicable standard.)

8. Statement that the Petition Has Been Sent to the Regional Board

A copy of this Petition is being served upon the Executive Officer of the Regional Board, and upon all other permittees to the Permit.

9. Statement that Issues/Objections Were Raised Before the Regional Board

The substantive issues raised in this Petition were all raised to the Regional Board before the Regional Board acted on November 8, 2012.

10. Service of Petition

This Petition is being served upon the following parties via electronic mail, facsimile, or U.S. Mail:

State Water Resources Control Board
Office of Chief Counsel
Jeannette L. Bashaw, Legal Analyst
P.O. Box 100
Sacramento, CA 95812-0100
Facsímile: (916) 341-5199
jbashaw@waterboards.ca.gov

California Regional Water Quality Control Board
Los Angeles Region
Samuel Unger, Executive Officer
320 West 4th Street, Suite 200
Los Angeles, CA 90013
Facsimile: (213) 576-6640
sunger@waterboards.ca.gov

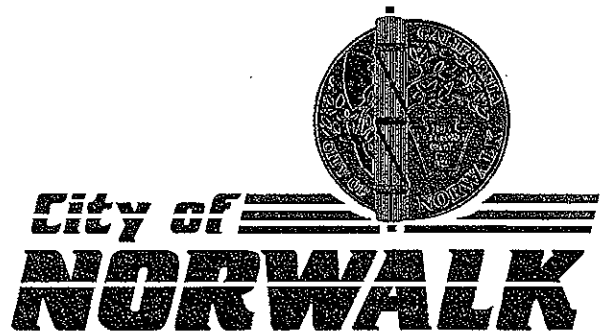
11. Conclusion

For the reasons stated herein, Petitioner has been aggrieved by the Regional Board's action in adopting the Permit. Issues raised in this Petition, however, may be resolved or rendered moot by Regional Board actions or developments in other jurisdictions. Accordingly, until such time as Petitioner requests the State Board to consider this Petition, Petitioner requests the State Board hold this Petition in abeyance.

Sincerely,

Michael J. Egan
City Manager

EXHIBIT A



12700 NORWALK BLVD., P.O. BOX 1030, NORWALK, CA 90651-1030 * PHONE: 562/929-5700 * FACSIMILE: 562/929-5773 * WWW.NORWALKCA.GOV

July 23, 2012

VIA U.S. MAIL AND E-MAIL (PDF)

Mr. Ivar Ridgeway
California Regional Water Quality Control Board, Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, California 90013
LAMS42012@waterboards.ca.gov
rpurdy@waterboards.ca.gov
iridgeway@waterboards.ca.gov

Dear Mr. Ridgeway:

The City of Norwalk ("City') submits the following comments to the Los Angeles Regional Water Quality Control Board's ("Regional Board") Tentative Order No. R4-2012-xxx, NPDES Permit No. CAS004001) ("Permit"). The LA Permit Group has submitted comments regarding the Permit, which the City joins and incorporates herein. The City reserves the right to make additional legal comments on the Permit prior to the close of the public hearing to adopt the Permit and at the public hearing itself.

On behalf of the City of Norwalk, we hereby submit the following initial comments on the Permit:

1. The Time Provided to Review the Permit Is Insufficient and Denies Permittees Due Process of Law

The period provided to review and comment on the Permit has been unreasonably short given the breadth of the Permit. Beginning on March 28, 2012, Regional Board staff issued a series of Staff Working Proposals pertaining to key sections of the Permit. Regional Board staff has used their Staff Working Proposal workshops as a justification for the hurried manner in which the Permit was developed. The same justification was used by the Executive Director in denying the LA Permit Group's request for a time extension.

This justification, however, fails for several reasons. First, Regional Board staff gave the permittees only a few weeks to comment on each of the Staff Working Proposals. Furthermore, the Regional Board staff did not respond to any comments, leaving permittees to guess at which requirements would be incorporated into the Permit. Seeing the Permit in its entirety and having the opportunity to understand how each of the sections and programs work together is imperative in order for permittees to fully understand the Permit provisions and to prepare comments.

Second, despite all the working proposals, workshops, and meetings, the permittees are left with a Permit that cannot be complied with from the first day the Permit goes into effect, due to the Receiving Water Limitation (RWL) and the Waste Load Allocations (WLA) requirements that could subject the permittees to third party lawsuits.

We believe the Regional Board wants a review process that is open and transparent. Providing permittees only forty-five (45) days to comment makes this impossible. To develop and provide relevant and meaningful comments, each permittee must first:

- Read a 500 page Permit;
- Study the 500 page Permit to understand how the provisions work together;
- Compare it to the last Permit;
- Evaluate the resource needs to comply with the Permit;
- Determine the fiscal and organizational impacts on City services, which requires coordination with several City departments;
- Conduct technical and legal review of the Permit and prepare comments;
- Present information to and gather feedback from the City Council. Staff needs time to conduct a thorough review of the items listed above, prior to presenting them to the City Council; and
- Prepare written comments.

To ensure a proper review of the Permit, the City hereby requests an extension of 180 working days to include a Revised Tentative Permit to be released with a 45-day comment period. The intent of a Revised Tentative Permit is to ensure the permittees have the opportunity to review any changes made to the existing draft and provide comments prior to the Permit adoption hearing. Additionally, this extension request will resolve a conflict our city management and officials have with the current September 6-7, 2012 hearing date, which overlaps with the annual League of Cities conference in San Diego.

The extreme speed with which the Permit is being circulated and reviewed and proposed to be adopted amounts to a denial of the City's due process rights and is contrary to state and federal law. By denying the permittees a meaningful opportunity to review and comment on a Permit that so drastically affects the permittees' rights and finances, the Regional Board has denied the permittees due process rights under state and federal law. *See Spring Valley Water Works v. San Francisco*, 82 Cal. 286 (1890) (reasonable notice and opportunity to be heard are essential elements of "due process of law," whatever the nature of the power exercised.) Furthermore, under the Clean Water Act, a reasonable and meaningful opportunity for stakeholder participation is

mandatory. *See, e.g., Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 381 (8th Cir. 1994) ("the overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal CWA.") For the reasons stated above, the Permit does not satisfy the Clean Water Act standard and violates the City's due process rights.

2. The Permit Should Be Revised to Provide that Implementation of BMPs is Sufficient to Constitute Compliance with the Permit

Permittees should be able to achieve compliance with the Permit through a best management practice ("BMP") based iterative approach. Regional Board staff has previously indicated that it would not create a permit for which permittees would be out of compliance from the very first day the Permit goes into effect. This necessarily means the Permit cannot require immediate strict compliance with water quality standards. Yet the Fact Sheet states that a party whose discharge "causes or contributes" to an exceedance of a water quality standard is in violation of the Permit, even if that party is implementing the iterative process in good faith. *See* Fact Sheet at pp. F-35-38. These positions are incompatible and effectively render the iterative approach meaningless.

As written, the Permit requires that all discharges to receiving waters must immediately meet water quality standards to avoid violating the Permit. For example, city runoff would now be immediately subject to limitations on such "pollutants" as aluminum and iron. Cities must be given a reasonable opportunity to determine the current level of these "pollutants", and then develop economically and technically feasible control measures, preferably through an iterative adaptive approach.

This presents an impossible standard for permittees to meet, especially given the fact that thirty-three (33) TMDLs have been incorporated into the Permit. This means that numerous water bodies that currently do not meet water quality standards will be governed by the Permit and permittees will be subject to potential liability immediately. Even for TMDLs for which the Regional Board issues time scheduling orders, such orders will not protect a permittee from third-party lawsuits for measured exceedances, based on the Permit's current language. Even if such lawsuits are unfounded, the legal costs to defend such suits are enormous. For this same reason, final wasteload allocations should not be incorporated into the Permit, especially where we are dealing with TMDLs that have been rushed through due to the *Browner* consent decree with the understanding that they would be refined over time with reopeners as new information becomes available.

A BMP-based approach should be utilized in the Permit, as outlined in EPA's November 12, 2010 Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs." ("EPA Memorandum"). *See also* 40 C.F.R. § 122.44(k).

To accomplish this purpose, the City supports using the receiving water limitation language proposed by CASQA, which is similar to the language in the Draft Caltrans Permit. If State agencies are granted this approach, municipalities should be granted the same. Otherwise, cities will be potentially vulnerable to third party lawsuits such as those brought against the City of Stockton and the County of Los Angeles by third parties within the last five years.

Furthermore, the EPA Memorandum is clear that an increased reliance on numerics should be coupled with the "disaggregation" of different storm water sources within permits. *See* EPA Memorandum at pp. 3-4. The Permit currently aggregates multiple sources of storm water runoff while additionally imposing numeric standards. This will result in a system whereby the innocent will be punished alongside the guilty for numeric standard exceedances. The Regional Board should not allow this inequitable and legally unjustifiable result to occur.

Another reason for adopting a BMP-based approach is the fact that new and existing conditionally exempt non-stormwater discharges may also contribute to measured exceedances. This inequitable result means the exempt discharges may nonetheless contribute to permittee liability.

3. The Permit Improperly Intrudes Upon the City's Land Use Authority in Violation of the Tenth Amendment of the U.S. Constitution and the City's Police Power

To the extent that this Permit relies on federal authority under the Clean Water Act to impose land use regulations and dictate specific methods of compliance, it violates the Tenth Amendment of the U.S. Constitution. Furthermore, to the extent the Permit requires a municipal permittee to modify its city ordinances in a specific manner, it also violates the Tenth Amendment. According to the Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article XI, section 7 of the California Constitution also guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." *See also City of W. Hollywood v. Beverly Towers*, 52 Cal. 3d 1184, 1195 (1991). Furthermore, the United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers to protect the public health, safety, and welfare of its residents. *See Berman v. Parker*, 348 U.S. 26, 32-33 (1954). Because it is a constitutionally conferred power, land use powers cannot be overridden by State or federal statutes.

Even so, both the Clean Water Act and the Porter-Cologne Act provisions regarding NPDES permitting do not indicate that the Legislature intended to preempt local land use authority. *Sherwin Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893 (1993); *California Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal. App. 4th 1302, 1309

(1998) (Preemption of police power does not exist unless "Legislature has **removed** the constitutional police power of the City to regulate" in the area); *see* Water Code §§ 13374 and 13377 and 33 U.S.C. § 1342 (b)(1)(B).

If the Permit is adopted, the City believes that this Permit could establish the Regional Board as a "super municipality" responsible for setting zoning policy and requirements throughout Los Angeles County. The prescriptive and one-size-fits-all nature of this policy will ensure that any resident or business challenging the conditions set forth in this Permit would not only sue the municipality charged with implementing these requirements, but would also have to sue the Regional Board itself to obtain the requested relief. The City does not believe this is the intent of the Regional Board. Rather than adopting programs that dictate the precise method of compliance, the Regional Board should collaborate with the City and other permittees to develop a range of model programs that each municipality could then modify and adopt according to its own individual circumstances.

4. The Permit Constitutes an Unconstitutional Unfunded Mandate

The Permit contains mandates imposed at the Regional Board's discretion that are unfunded and go beyond the specific requirements of either the Clean Water Act or the EPA's regulations implementing the Clean Water Act, and thus exceed the "Maximum Extent Practicable" ("MEP") standard. Accordingly, these aspects of the Permit constitute non-federal state mandates. *See City of Sacramento v. State of California*, 50 Cal. 3d 51, 75-76 (1990). Indeed, the Court of Appeals has previously held that NPDES permit requirements imposed by the Regional Board under the Clean Water and Porter-Cologne Acts can constitute state mandates subject to claims for subvention. *County of Los Angeles v. Commission on State Mandates*, 150 Cal. App. 4th 898, 914-16 (2007).

The Permit goes beyond federal law, as the Permit is at least twice as long, and in some cases, three times as long as other MS4 permits developed by other Regional Boards in the State of California, such as the Lahontan Regional Board and the Central Valley Regional Board, not to mention permits developed by EPA. This means that either some Regional Boards are failing to impose federally mandated requirements pursuant to the Clean Water Act, or the more likely explanation is that the Regional Board is imposing requirements that go beyond federal law.

A. The Permit's Minimum Control Measure Program is an Unfunded State Mandate

The Permit's Minimum Control Measure program ("MCM Program") qualifies as a new program or a program requiring a higher level of service for which state funds must be provided. The particular elements of the MCM Program that constitute unfunded mandates are:

- The requirements to control, inspect, and regulate non-municipal permittees and potential permittees (Permit at pp. 38-40);

- The public information and participation program (Permit at pp. 58-60):
- The industrial/commercial facilities program (Permit at p. 63);
- The public agency activities program (Permit at pp. 56-63); and
- The illicit connection and illicit discharge elimination program (Permit at pp. 106-109).

We would like to draw particular attention to the following items that shift responsibility from other agencies to the permittees:

- Under the construction provisions for sites over one (1) acre. There are overlaps in SWPPP applications and inspections. Permittees should not be responsible for ensuring the SWPPP application process and the increased number of inspections being mandated. This should only be imposed on the City if the State provides the City with a portion of the fees already collected as reimbursement to cover those additional costs.

- Under Section D.7.h.ii.(8), the verification that contractors have obtained various State permits (401, 404, 1600, etc.) should not be the responsibility of the city. As owner/operator of the flood control channels where the actual connections will be made, verification of these permits should be the responsibility of the Army Corps of Engineers or the Los Angeles County Flood Control District.

The MCM Program requirement that the permittees inspect and regulate other, non-municipal NPDES permittees is especially problematic and clearly constitutes an unfunded mandate. (*See, e.g.*, Permit at pp. 38-40.) These are unfunded requirements, which entail significant costs for staffing, training, attorney fees, and other resources. Notably, the requirement to perform inspections of sites already subject to the General Construction Permit is clearly excessive. Permittees would be required to perform pre-construction inspections, monthly inspections during active construction, and post-construction inspections. The requirements of this Permit exceed past permits, meaning that the Regional Board is requiring a higher level of service than in prior permits.

Furthermore, there are no adequate alternative sources of funding for inspections to be conducted by the City. User fees will not fully fund the program required by the Permit. Cal. Gov't Code, § 17556(d). NPDES permittees already pay the Regional Water Quality Control Boards fees that cover such inspections in part. It is inequitable to both cities and individual permittees for the Regional Board to charge these fees and then require cities to conduct and pay for inspections without providing funding.

B. The Outfall Monitoring Program Is an Unfunded Mandate That Should be Revised

Additionally, the newly proposed outfall monitoring program in its entirety represents an extremely expensive endeavor. This needs to be completely revised in order to make it economically viable. As part of the Coyote Creek/San Gabriel River Metals TMDL, Norwalk is looking at a shared cost of hundreds of thousands of dollars in monitoring

costs. The costs for this additional outfall monitoring which will include costs for post-construction treatment system evaluation and even more additional costs for pyrethroid studies, even if limited to HUC-12 units of approximately 20 square miles of tributary area will be unachievable. Attachment E should be listed as "items that could be included in a monitoring plan" and this program will then be developed over the next several years.

C. The Receiving Water Body Requirements Render the Permit an Unfunded Mandate

If strict compliance with state water quality standards in receiving water bodies is required—including state water quality standard-based wasteload allocations—in the MS4 itself or at outfall points and in receiving water bodies, the entire Permit will constitute an unfunded mandate because such a requirement clearly exceeds both the Federal standard and the requirements of prior permits, despite the fact no funding will be provided. *See Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, 124 Cal. App. 4th 866, 873, 884-85 (2004) (though the State and Regional Boards may require compliance with California state water quality standards pursuant to the Clean Water Act and state law, these requirements exceed the Federal Maximum Extent Practicable standard.)

D. The City Does Not Necessarily Have the Requisite Authority to Levy Fees to Pay for Compliance With the Order

The ability to fund the Permit through bond measures or tax increases does not render the Permit's program ineligible for a subvention claim because such funding mechanisms are contingent upon voter approval, in some cases requiring supermajority votes. *Howard Jarvis Taxpayers Assoc. v. City of Salinas*, 98 Cal. App. 4th 1351 (2002). The money available from other sources is both too speculative and limited to cover all or even some of the costs imposed by the Permit. Such speculative funding sources cannot count as viable sources of funding so as to preclude a subvention claim. Cal. Gov't Code, § 17556(f). Furthermore, even if some portions of the Permit's programs can be covered by user fees, these fees will not come close to covering all such costs, meaning permittees' general funds will have to be utilized to cover substantial portions of these costs. Cal. Gov't Code, § 17556(d) (the ability to charge fees only defeats a subvention claim where the fees are sufficient to fully fund the program.)

5. The Permit's Monitoring Program Exceeds the Requirements of Law

The Permit's Receiving Water Monitoring Program is improper for going well beyond the scope of monitoring requirements authorized under Water Code Sections 13267 and 13383. The relevant portion of Water Code Section 13267 states:

> "(b) (1) In conducting an investigation . . . the regional board may require that . . . any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that

> could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports."

The Regional Board's failure to conduct and communicate the requisite cost-benefit analysis pursuant to the monitoring requirements in the Permit constitutes an abuse of discretion. Water Code §§ 13267 and 13225(c).

The relevant portions of Water Code Section 13383 state:

> "(a) The . . . regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements . . . for any person who discharges, or proposes to discharge, to navigable waters. . . .
>
> (b) The . . . or the regional boards may require any person subject to this section to establish and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods, sample effluent as prescribed, and provide other information as may be reasonably required."

The Permit goes far beyond a requirement that a permittee "monitor" the effluent from its own storm drains. The Permit's Receiving Water Monitoring Program seems to require a complete hydrogeologic model found in the receiving water body, which will in many cases be miles away from many of the individual permittees' jurisdictions. To the extent the Permit requires individual permittees to compile information beyond their jurisdictional control, they are unauthorized. Although Water Code Section 13383(b) permits the Regional Board to request "other information", such requests can only be "reasonably" imposed. Cal. Water Code § 13383(b). The information requested by the Regional Board is unreasonable. It is not just limited to each individual copermittee's discharge. Rather, the Permit requires copermittees to analyze discharges and make assumptions regarding factors well beyond their individual boundaries. This is not reasonable, and is therefore not permitted under Water Code Sections 13225, 13267, and 13383. It is equally unreasonable to require the monitoring of authorized or unknown discharges. *See* Permit at p. 108.

6. The Permit Exceeds the Regional Board's Authority by Requiring the City to Enter into Contracts and Coordinate With Other Co-Permittees

The Regional Board cannot require the City to enter into agreements or coordinate with other co-permittees. The requirements that permittees engage in interagency agreements (Permit at p. 39) and coordinate with other copermittees as part of their stormwater management program (Permit at p. 56-58) are unlawful and exceed the authority of the Regional Board. The Regional Board lacks the statutory authority to mandate the creation of interagency agreements and coordination between permittees in an NPDES Permit. *See* Water Code §§ 13374 and 13377. The Permit creates the

potential for City liability in circumstances where the permittee cannot ensure compliance due to the actions of third party state and local government agencies over which the City has no control. Such requirements are not reasonable regulations, and thus violate state law. *Communities for a Better Environment v. State Water Resources Control Bd.*, 132 Cal. App. 4th 1313, 1330 (2005) (regulation pursuant to NPDES program must be reasonable.)

7. The Permit Fails to Consider Economic Impacts As Required by Water Code Sections 13000 and 13241

The Regional Board's failure to adequately consider the economic impacts of the Permit, as required by Water Code Sections 13000 and 13241, render the Permit invalid. Water Code Section 13241 requires the Regional Board to include "[e]conomic considerations" with its consideration of the Permit. As demonstrated above, the Regional Board is incorrect in its assertion that consideration of economics is not required in this Permit. *See* Permit at pp. 24-25. Because, as demonstrated above, the Permit requires new and higher levels of service in numerous key regards, consideration of economic factors is necessary. *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 627 (2005).

The alleged facts in the economic consideration section of the Fact Sheet misrepresent the permittees' data and fail to consider the economic impact of new, costly aspects of the Permit. The Fact Sheet's open skepticism of municipal financial reports is troubling, and indicates the Regional Board has not taken permittees' actual expenses seriously.

It is also premature and improper to assume that permittees will obtain funding from proposed ballot measures and other sources of funding which have not even been approved, much less voted on by the public. *See* Fact Sheet at pp. F-142-43. If the Regional Board wants to rely on initiatives, such as the Los Angeles County Flood Control District's Water Quality Funding Initiative, as sources of funding to offset the costs of storm water management, it should delay its public hearing and approval of the Permit until after the voters have actually voted on such initiatives. Otherwise, if such initiatives fail to pass, the co-permittees will be left to implement the Permit's requirements without the funds to do so. Even if the Water Quality Funding Initiative is approved by the voters, the funds generated by the Initiative would not even be available until 2014 – well after the deadline for a majority of the compliance deadlines set forth in the Permit. Moreover, the Water Quality Initiative will not cover all the costs imposed on all permittees by the Permit.

The Permit also fails to consider the significant additional costs that TMDLs will impose. The incorporation of TMDLs and the massive expansion of monitoring requirements in the Permit, which also trigger the need for additional inspectors, will inevitably cause the copermitees' costs to skyrocket. Furthermore, speculations about what people may be willing to pay for cleaner water and social benefits from clean water have no real effect on cities' bottom lines. Finally, the Permit fails to account fully for all the expenses that implementing minimum control measures will impose. For all these reasons, the consideration of economic impact is entirely lacking, which violates state law.

8. The Permit's Imposition of Joint and Joint and Several Liability for Violations is Contrary to Law

The Permit appears to improperly impose joint liability and joint and several liability for water quality based effluent limitations and receiving water exceedances. It is both unlawful and inequitable to make a permittee liable for the actions of other permittees over which it has no control. A party is responsible only for its own discharges or those over which it has control. *Jones v. E.R. Shell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1348 (N.D. Ga. 2004). Because the City cannot prevent another permittee from failing to comply with the Permit, the Regional Board cannot, as a matter of law, hold the City jointly or jointly and severally liable with another permittee for violations of water quality standards in receiving water bodies or for TMDL violations. Under the Water Code, the Regional Board issues waste discharge requirements to "the person making or proposing the discharge." Cal. Water Code § 13263(f). Enforcement is directed towards "any person who violates any cease and desist order or cleanup and abatement order . . . or . . . waste discharge requirement." Cal. Water Code § 13350(a). In similar fashion, the Clean Water Act directs its prohibitions solely against the "person" who violates the requirements of the Act. 33 U.S.C. § 1319. Thus, there is no provision for joint liability under either the California Water Code or the Clean Water Act.

Furthermore, joint liability is proper only where joint tortfeasors act *in concert* to accomplish some common purpose or plan in committing the act causing the injury, which will generally never be the case regarding prohibited discharges. *Kesmodel v. Rand*, 119 Cal. App. 4th 1128, 1144 (2004); *Key v. Caldwell*, 39 Cal. App. 2d 698, 701 (1940). For any such discharge, it would be unlawful to impose joint liability and especially joint and several liability. The issue of imposing liability for contributions to "commingled discharges" of certain constituents, such as bacteria, is especially problematic because there is no method of determining who has contributed what to an exceedance.

For receiving water body exceedances, the Permit should specify that the burden is on the Regional Board to show that any permittee's discharge caused or contributed to that exceedance. Requiring permittees to prove they did not cause or contribute an exceedance is both inequitable and unlawful. Permittees should not be required to prove they did not do something when the Regional Board has failed to raise even a rebuttable presumption that the contamination results from a particular permittee's actions. *See* Cal. Evid. Code § 500; *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658, 1667-1668 (2003).

9. The San Gabriel River Reach 1 Metals TMDL

As you are aware, the City of Norwalk is currently the Chair of the Coyote Creek and San Gabriel River Reach 1 Metals TMDL Technical Committee and we are pleased with the Regional Board staff's efforts to allow permittees subject to this USEPA TMDL to prepare a Watershed Implementation Plan in lieu of the Time Schedule Order as

originally proposed in the original permit drafts. The city is also pleased to see that the Regional Board's intent to recognize interim efforts as equating to compliance. Having said that, just exactly how these efforts will be recognized is still too vague and this needs to be further addressed (which will be contained in the Implementation Plan submitted to the Regional Board in early 2013).

Also, the city is concerned that the final TMDL goals will be strict numeric limits. For the purpose of this MS4 permit, it is requested that the final numeric limits be listed as iterative adaptive goals and that as the final date of the implementation period approaches, the Basin Plan be re-opened to review the progress to date and make a determination at that time whether to establish strict numeric limits or a continuation of the iterative adaptive process.

10. It is Unclear How Minimum Control Measures and the Watershed Management Program Interact

It is not clear from the Tentative Permit whether the intent is for cities such as Norwalk, which are subject to a US EPA TMDL to be given the option of implementing the Minimum Control Measures (as all other permittees are) or developing a Watershed Management Program. Section E.3.a (page 114) appears to require cities subject to US EPA TMDLs to use only the Watershed Management Program option (page 45) and conflicts with Section C.1.b (same page) where "participation in a Watershed Management Program is voluntary..."

11. Additional Comments and Suggestions for Revision

- Attachment A: Please provide definitions for: Construction Activity, Industrial Parks and Commercial Strip malls. Also provide a definition of "trash excluder."

- Item (4) on page 70: This item should be eliminated. It forces an evaluation of green roofs for every project, whether or not a green roof is proposed.

- Section h.viii (page 102). This section requires installation of trash excluders in Priority catch basins. Trash is not listed as impairment for either Coyote Creek or Reach 1 of the San Gabriel River. Since these water bodies are not listed as impaired, placement of these devices should be voluntary.

The City is dedicated to the protection and enhancement of water quality. The City, however, has other functions that require funding as well. If this Permit is adopted as proposed, even in the best case scenario, spending cuts to other crucial services such as police, fire, and public works are certain. Norwalk's dwindling general funds simply cannot take the financial hit this Permit is poised to impose on the City. The City believes a more measured approach is necessary, especially regarding how compliance in this Permit is achieved.

As public agencies, all parties involved in the NPDES permitting process have the obligation to carry out their duties in a responsible, realistic, and reasoned manner. Requirements that tether public agencies to impractical positions are counterproductive and violate our charge as representatives of the people. The City is committed to working with the State and Regional Boards in order to achieve our mutual goals and looks forward to engaging in a constructive dialogue with Regional Board staff on these issues.

Thank you in advance for consideration of these comments. If you have any questions or comments, please call Dan Garcia, City Engineer, at (562) 929-5727, or Adriana Figueroa, Administrative Services Manager, at (562) 929-5915.

Sincerely,

Mike Egan
City Manager

cc: Kurt Anderson, Community Development Director
Dan Garcia, City Engineer
Adriana Figueroa, Administrative Services Manager
John Hunter, John Hunter & Associates
Steve Dorsey, City Attorney